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Section 809 Panel: Hacking Away at the Regulatory Underbrush & Empowering the Acquisition Workforce

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By: Michelle V. Johnson | May 1, 2019

Section 809 Panel: Hacking Away at the Regulatory Underbrush & Empowering the Acquisition Workforce

Historically, efforts to improve defense acquisition have been more likely to add than subtract rules and requirements to an already complex buying process. Knowing this, Congress specifically tasked the Section 809 Panel to “clear out the underbrush.”

Many contracting requirements have become frustrating, compliance-driven processes that waste valuable time and energy that could be otherwise spent making smarter buys on behalf of the Department of Defense (DOD) and U.S. taxpayers. This article highlights three recommendations from Volume 3 of the Panel’s *Final Report*, released in January, that identify opportunities to restore efficiencies in the contracting process and empower acquisition professionals.

REC. 74: “ELIMINATE REDUNDANT DOCUMENTATION REQUIREMENTS OR SUPERFLUOUS APPROVALS WHEN APPROPRIATE CONSIDERATION IS GIVEN AND DOCUMENTED AS PART OF ACQUISITION PLANNING”

Throughout the three volumes of its *Final Report*, the Panel has advocated that acquisition decisions should be made at the most appropriate level. Too often, decisions that should be made at the working level are elevated and delayed. As Commissioner LTG Ross Thompson (U.S. Army, Ret.) recently explained on *Government Matters*:

It's very important that you empower the people and incentivize them to do the job, and you don't second guess them. The people who know the most about how to get things done are the people closest to the problem.[1]

Recommendation 74 evaluates duplicative guidance in the *Federal Acquisition Regulation (FAR)* and the *Defense FAR Supplement (DFARS)* that often leads program managers and contracting officers to create many planning documents twice—once for acquisition approval and once for contract approval. The Panel addresses six planning or compliance documents required by multiple regulations:

- Warranties,
- Options,
- Past performance evaluations,
- Electronic and Information Technology Accessibility Standards,
- Ozone-depleting products, and
- Contract consolidation.

Each of these documents is subject to separate review and approval processes, creates unnecessary work, and adds little value to the end product or service.

The Panel recommends eliminating separate determinations when the rationale has already been documented in an approved acquisition plan or acquisition strategy. For instance, options must currently be justified by the contracting officer for both the acquisition plan and procedures related to special contracting methods.[2] Past performance evaluation must be addressed for both the acquisition plan and as part of source selection planning. In these and other cases, the acquisition plan should be sufficient. To continue this kind of streamlining work, the Panel calls for DOD to identify and eliminate other overlapping requirements among the acquisition plan, acquisition strategy, and relevant DOD Instructions (i.e., 5000.02, 5000.74, and 5000.75).

The Panel also suggests streamlining the approval process for those documents that remain. Determinations documented within the acquisition plan or acquisition strategy should be delegated to the plan or strategy approving authority. When rationale must be documented or approved by a higher authority, it should be consolidated into one place with a singular approval authority. For example, current statute requires the head of the agency to approve a single-source task-order or delivery-order contract valued at \$112 million or more. This justification is already addressed in the acquisition plan, but

the *FAR* requires a separate determination and approval. Here the *FAR* is contradictory, first delegating responsibility for determining the number of awardees to the contracting officer, then reserving the determination for a higher authority. The Panel recommends repealing this requirement for approval from the head of the agency.

Consensus within DOD and the broader federal acquisition community is that the administrative time preceding issuance of solicitations and awards is much too long. In 2017, the Under Secretary of Defense for Acquisition and Sustainment, Ellen Lord, set the goal of a 50% reduction in Procurement Administrative Lead Time (PALT). Small procurements routinely spend at least six months and large procurements frequently take years in this documentation and approval process, significantly delaying the delivery of needed capabilities to the warfighter. In one example, it took 559 days (19 months) for an acquisition strategy for IT services to be generated and approved, and only after this approval could the procurement advance to the next steps of issuing a solicitation and eventually making an award.

Many approvals require unnecessarily high levels of authority, significantly slowing down each step of the contracting process. Currently, for example, contract type approvals are required to go up to the Service Acquisition Executive or equivalent when entering into cost-reimbursement contracts exceeding \$50 million, with the threshold lowering to \$25 million after fiscal year 2019. This process is intended to discourage use of contracts other than fixed price, but adds time and duplicates effort already undertaken in acquisition planning. The Panel suggests eliminating the requirement for separate contract type determinations when the decision has already been approved as part of a written acquisition plan or acquisition strategy. If a written acquisition plan or strategy is not required, contract type determinations can be delegated to a single approval authority no higher than the Chief of the Contracting Office.

REC. 75: “REVISE REGULATIONS, INSTRUCTIONS, OR DIRECTIVES TO ELIMINATE NON-VALUE-ADDED DOCUMENTATION OR APPROVALS”

Recommendation 75 streamlines four processes that involve more people and time than necessary, especially when contracting actions must be coordinated with other agencies.

For example, DOD requires additional documentation to justify use of a governmentwide best-in-class contract vehicle. This documentation process can take months and ends up incentivizing contracting personnel to use or create agency-unique contract vehicles, conflicting with the Office of Management and Budget's category management policy to prioritize governmentwide contracts. The Panel recommends eliminating this additional documentation requirement.

In another example, contracting officers must follow two different processes to confirm that contractors comply with federal equal employment opportunity laws. Contracts and subcontracts over \$10 million must include a *FAR* clause requiring compliance with equal opportunity rules, regulations, and orders. A separate pre-award clearance is required from the Department of Labor's Office of Federal Contract Compliance Programs, often leading to significant delays. This duplicative and time-consuming requirement should be eliminated.

REC. 76: "REVISE THE FAIR OPPORTUNITY PROCEDURES AND REQUIRE THEIR USE IN TASK AND DELIVERY ORDER COMPETITIONS"

Recommendation 76 stresses using streamlined fair opportunity procedures when competing orders under multiple-award indefinite delivery/indefinite quantity contracts, rather than the lengthier FAR Part 15 source selection procedures often used by default. When properly designed and followed, FAR 16.5 procedures save time and money for DOD and industry partners, as well as get needed capabilities to users faster. These procedures also encourage innovation in the contracting process by providing substantial flexibility to contracting officers and explicitly authorizing broad discretion in the process. The Panel recommends requiring the use of these streamlined procedures and developing a fair opportunity desk guide. Additional changes would clarify what constitutes streamlined ordering procedures (e.g., subfactors are not required) and increase the enhanced competition threshold for using these procedures from \$5.5 million to \$7 million.

CONCLUSION

Federal contracting officers spend years in formal training and must pass an extensive exam demonstrating their knowledge of acquisition regulations. When contracting officers receive warrants to buy on behalf of the U.S. government, it is an institutional acknowledgement that they are highly informed and able to make complex decisions. The Panel's recommendations to clear out and simplify contracting processes not only save time and money, but also demonstrate trust in the professional judgment of these highly trained members of the acquisition workforce. *CM*

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ENDNOTES

[1] *As quoted within* Andrew Wagner, "Section 809 Report: Recommendations for Acquisition Workforce," *Government Matters* (March 5, 2019), available at <https://govmatters.tv/section-809-report-recommendations-for-acquisition-workforce/>.

[2] FAR Part 17.